IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 85 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAGWANJI & KALYANJI - Appellant(s)
Versus
PUNJABHAI HAJABHAI RATHOD - Defendant(s)

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Appearance :
MR MEHUL A SHAH for Appellant,
MR VG DAVE, LEARNED COUNSEL UNDER THE AUTHORITY OF MR YOGESH S LAKHANI for the respondent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/09/2006

ORAL JUDGMENT

1. Parties are heard.

2. The appellant-original plaintiff being aggrieved by the judgment and decree dated

29th March, 1986, passed in Regular Civil Appeal No. 20 of 1985, by the learned Assistant Judge at Porbandar, confirming the judgment and decree dated 27th March, 1985, passed in Regular Civil Suit No.177 of 1982, by the learned Civil Judge (J.D.) Porbandar, is before this Court with the submission that on one side the learned trial court rejected the plaintiff's application for production of the document which was illegal and the appellate Court did not consider the said argument iner-alia holding that the plaintiff did not challenge the said order in duly constituted form. The submission of Mr. Shah that the judgment of the learned first appellate Court is per-incurium Section 105 of the Civil Procedure Code which provides that a person if is aggrieved by an interim order which had ultimately led to a wrong and incorrect judgment can always challenge the correctness of the said order in an appeal which is filed against the judgment and under Section 105 of the Code of Civil Procedure,

the appellate Court would have powers to examine the correctness and validity of such order which had vitiated the entire proceeding and led to wrong findings or illegal judgment.

3. He also submits that the document was sought to be produced before the learned first appellate Court during course of cross-examination as additional evidence, but the said application was also unceremoniously rejected.

4. The appeal has been admitted for hearing the parties on the following substantial questions of law.

> “1. Whether the orders passed by the Trial Court on interim application cannot be made a ground of appeal ?
> 2. Whether carbon copy of the document, the agreement, acknowledging dues executed by the defendant should have been allowed to be produced ?”

5. After taking me through the judgments of the Court below Mr. Shah submits that even the carbon copy of the document which was

prepared in the very same process would be admissible in evidence though question relating to its authenticity or genuineness can always be raised by the other side. Referring to the provisions of the Indian Evidence Act he submits that a carbon copy can always be produced in evidence.

6. Shri Dave, learned counsel for the respondent, on the other hand submits that if the order passed by the learned trial Court relating to production of document was not challenged right in time, then the same could not be made a ground of appeal. He submits that carbon copy of the document would not have been admissible in evidence unless the document is proved to have been lost or so.

7. So far as the first question is concerned, I must immediately answer the same in favour of the appellant. Section 105 of the Code of Civil Procedure provides that unless otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate

jurisdiction ; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. As sub Section (2) is not relevant for out purpose, I am not referring the same. Section 105 in its clear terms provides that against some particular order if an appeal is not provided, then such an order can be challenged in an appeal which is filed against the final judgment and decree. The reason behind Section 105 is that a party is not required to rush to the revisional Court every time and at the same time does not allow the party to say that though against the impugned order appeal was provided but he did not file the appeal.

8. Undisputedly an order accepting or rejecting a document would not be an appealable order therefore, correctness, validity and propriety of the order can be challenged before the appellate Court with the help and

assistance of Section 105 of Code of Civil Procedure. The learned first appellate Court was absolutely unjustified in holding that in absence of a revision challenging the correctness of the order passed by the trial Court, it would not be open to the appellate Court to examine the validity/correctness of the order.

9. So far as question No.2 is concerned, a perusal of Section 62 of the Indian Evidence Act, 1872 would make it clear that primary evidence means the document itself produced for the inspection of the Court. Explanation 1 provides that where a document is executed in several parts, each part is the primary evidence of the document; where a document is executed in counterpart, each counterpart is being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. In the present case, the submission of the plaintiff had been that the document was executed in two parts, he was left with the

carbon copy which was executed in the very same process and was in fact a counter part of the original. If that be so, the said carbon copy would be primary evidence for the purposes of its production. It would be altogether different thing that the parties against whose interest the document is sought to be produced may challenge its genuineness or may disprove the same.

10. So far as the production of the document at late stage is concerned, it must be noticed that the plaintiff wanted to use the document at the time of cross-examination of the defendant and confront him with his own wrong. To such a case provisions of Order 13 (1)(a) would apply and the plaintiff would be entitled to produce the evidence at the time of cross-objection if any party wants any document to be produced in evidence to confront a witness then non-production at an earlier stage would be immaterial.

11. Taking into consideration the totality of the circumstances, I must hold that the first

appellate Court was unjustified in dismissing the appeal and at the same time, the learned trial Court was also unjustified in rejecting the plaintiff's application for production of the document.

12. As a sequel to the above discussion, both the questions are answered in favour of the plaintiff. The appeal is allowed. The judgment and decree passed by the learned Courts below are set aside, the matter is remanded back to the learned trial Court for its disposal in accordance with law after giving due opportunity to the plaintiff to produce document in evidence. If the plaintiff makes an application for recall of the witness or witnesses to prove his document, then such an opportunity would be given to him. If the plaintiff wants to examine his own-self in support of the said document, then the plaintiff or his witness would also be given an opportunity to step into the witness box. The defendant obviously would be entitled to lead further evidence to

disprove the document in question.

13. The appeal is allowed. No costs. The parties present in the Court shall appear before the learned trial Court on 1st November, 2006. A copy of this judgment along with the record be sent to the learned trial Court immediately. Let a decree be framed accordingly.

(R.S.GARG, J.)

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